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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

**IN RE FACEBOOK PPC ADVERTISING
LITIGATION**

**This Document Relates To:
All Actions.**

Master File No. C 09-03043 PJH
**AMENDED JOINT CASE
MANAGEMENT
CONFERENCE STATEMENT**

Date: March 26, 2015
Time: 2:00 p.m.
Courtroom: 3, 3rd Floor
Judge: Honorable Phyllis J. Hamilton

1 Plaintiffs and Defendant Facebook, Inc. (“Defendant” or “Facebook”) respectfully submit this
 2 Joint Case Management Conference Statement in response to the Court’s February 6, 2015 request
 3 that the parties submit “a joint case management statement setting forth a proposal for the scheduling
 4 and resolution of the remaining issues,” Dkt 292, now that the appeal in this matter has been resolved
 5 by the Ninth Circuit Court of Appeals.

6 **I. SUMMARY OF PROCEEDINGS TO DATE**

7 Plaintiffs filed their initial Consolidated Class Action Complaint (“CCAC”) on November 20,
 8 2009, in which they asserted statutory and common law claims for relief and sought a variety of legal
 9 remedies. Defendant denied any wrongdoing. On April 22, 2010, the Court entered an Order
 10 Granting In Part And Denying In Part Defendant’s Motion To Dismiss And Denying Motion to
 11 Strike. On May 21, 2010, Plaintiffs filed a Consolidated Amended Complaint, which Defendant
 12 moved to dismiss on June 14, 2010. On August 25, 2010, the Court issued an order granting in part
 13 and denying in part Defendant’s motion to dismiss. Plaintiffs filed a Consolidated Second Amended
 14 Complaint on September 24, 2010, and Defendant moved for partial dismissal on October 22, 2010.
 15 This motion was granted and Plaintiffs opted not to amend.

16 Following extensive fact and expert discovery, Plaintiffs filed their motion for class
 17 certification on August 29, 2011. The Court denied class certification on April 13, 2012. Plaintiffs
 18 filed a petition for permission to appeal pursuant to Fed. R. Civ. P. 23(f), which was granted on July
 19 17, 2012. On December 26, 2014, the Ninth Circuit Court of Appeals issued an order affirming this
 20 Court’s denial of Plaintiffs’ motion for class certification. The matter was then remanded to this
 21 Court for further proceedings.

22 **II. THE PARTIES’ PROPOSALS**

23 **A. Plaintiffs’ Proposal & Facebook’s Response.**

24 **Plaintiffs’ Proposal:**

25 Plaintiffs brought this class action suit against Facebook for improper charges that they and
 26 members of the Class incurred in connection with advertising placed on Defendant’s website at
 27 www.facebook.com during the period of January 1, 2006 to the present. Plaintiffs contracted with
 28

Facebook to pay Facebook a fee each time a person “clicked” on Plaintiffs’ advertisements on the Facebook website in a conscious attempt to view the advertisement. Plaintiffs and Facebook regarded such action (by a Facebook user) as a valid, or billable, “click” for which advertisers were contractually obligated to pay Facebook a fee in accordance with their contract. Plaintiffs allege that Facebook systematically fails to limit charges to valid clicks. Instead, Plaintiffs allege that advertisers have been and continue to be unlawfully charged for and presently pay for a range of various types of invalid clicks.

The Ninth Circuit affirmed this Court’s order denying class certification but did so on grounds different from this Court. The Ninth Circuit ruled that Plaintiffs’ expert had failed to perform the methodology that he testified was a feasible way to determine valid and invalid clicks. The Court declined to rule on the basis for which this Court denied certification. Plaintiffs intend on refiling their class certification motion within 120 days, after limited discovery focused on the data logs maintained by Facebook, and will demonstrate in their expert’s declaration the feasibility of their methodology by implementing it with actual data from Facebook. Plaintiffs will also propose a narrower class that is focused on only particular filter that they claim is violative of the contract. Plaintiff will also seek certification of a declaratory and/or injunctive relief class under Rule 23(b)(2) and in the alternative, certification of issue classes under Rule 23(c)(4). The Federal Rules of Civil Procedure expressly permit motions to amend class certification orders. *See* Fed. R. Civ. P. 23 (c) (“*Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.”). In fact, the Honorable Margaret Morrow recently granted an amended motion for class certification in *In re ConAgra Foods, Inc.*, 2015 U.S. Dist. LEXIS 24971, at *4 (C.D. Cal. 2015). In any event, Plaintiffs do not believe a case management conference statement is the proper place to make legal arguments.

Facebook’s Response:

Plaintiffs’ attempt to have a second bite at the apple, after nearly six years of hard-fought litigation, should be denied. By their own admission, Plaintiffs conducted extensive discovery (both fact and expert) prior to filing their class certification motion. Plaintiffs had ample opportunity to

1 request the additional material they now seek, to conduct the additional expert work they now
 2 propose, and to narrow the scope of the proposed class. But they made the tactical decision to not do
 3 any of this. In any case, Plaintiffs' belated proposals would make no difference at this point, because
 4 they would not cure the various defects that this Court and the Ninth Circuit identified in denying
 5 certification and affirming that denial. Granting Plaintiffs' request would serve only to impose unfair
 6 costs and burdens on Facebook to re-litigate an issue that has already been resolved.

7 For these and the other reasons discussed below, Plaintiffs' proposal should be denied and the
 8 case should proceed only as to Plaintiffs' individual claims.¹

9 **First**, there are no new facts or circumstances to warrant reconsideration of this Court's
 10 denial. As a general rule, "courts should not condone a series of rearguments on the class issues"
 11 absent a showing of "materially changed or clarified circumstances." Newberg on Class Actions §
 12 7:47. Numerous courts have applied this rule to reject efforts to file a renewed class certification
 13 motion after an initial motion is denied. *See, e.g., Hartman v. United Bank Card, Inc.*, 291 F.R.D.
 14 591, 596 (W.D. Wash. 2013) (quoting and applying Newberg); *Washington v. Vogel*, 158 F.R.D. 689,
 15 692-93 (M.D. Fla. 1994) (explaining that renewed motions require "materially changed or clarified
 16 circumstances, or the occurrence of a condition on which the initial class ruling was expressly
 17 contingent") (citation omitted); *Zapata v. IBP, Inc.*, 175 F.R.D. 578, 581 (D. Kan. 1997) (plaintiff
 18 was not entitled to "rehash and recast old arguments already considered by the court in its original

19
 20 ¹ Plaintiffs are simply wrong when they claim that the Ninth Circuit ruled on different grounds than
 21 this Court in denying certification. The opinion makes clear that the court *agreed* with this Court that
 22 Plaintiffs failed to satisfy their burden to meet the requirements of Rule 23(b)(3). *See Fox Test Prep*
 23 *v. Facebook*, No. 4:09 CV-3043 PJH, slip op. at 3-4 (9th Cir. Dec. 26, 2014). Like the district court,
 24 the Ninth Circuit specifically cited Plaintiffs' expert's failure to provide any workable method to
 25 distinguish between valid and invalid clicks and the expert's admission that he knew of "no sources"
 26 that provide any specific parameters for evaluating clicks. *Id.* at 4 ("Because Plaintiffs failed to meet
 27 their burden of demonstrating a workable class-wide methodology to determine what constitutes a
 28 "valid click," the district court did not abuse its discretion in denying class certification because
 common issues do not predominate . . . as required by Rule 23(b)(3)") (internal quotation marks and
 citation omitted); *In re Facebook, Inc., PPC Adver. Litig.*, 282 F.R.D. 446, 456 (N.D. Cal. 2012)
 ("The court finds that the proposed class cannot be certified under 23(b)(3) because . . . plaintiffs
 have . . . failed to establish that there is any uniform method for distinguishing, on a classwide basis,
 between 'invalid' clicks (at issue in the case) and 'fraudulent clicks' (not at issue in the case)").

1 ruling” denying class certification); *In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*,
 2 No. 09 MD 2072 (MGC), 2012 U.S. Dist. LEXIS 138638, at *3 (S.D.N.Y. Sept. 25, 2012) (renewed
 3 class certification motion unwarranted because plaintiff did not present “evidence of changed
 4 circumstances”); *Mogel v. UNUM Life Ins. Co. of Am.*, 677 F. Supp. 2d 362, 366 (D. Mass. 2009)
 5 (declining request to file a renewed motion that would merely “allow plaintiffs to revisit their prior
 6 (unsuccessful) tactical decision” in their initial class certification motion).

7 This rule reflects a recognition among courts that the class certification process imposes
 8 tremendous burdens on the parties and the judicial system, and allowing plaintiffs to file multiple
 9 class certification motions would unduly prejudice a defendant by forcing it to bear this burden
 10 multiple times. *Hartman v. United Bank Card, Inc.*, 291 F.R.D. 591, 596 (W.D. Wash. 2013)
 11 (plaintiffs’ request to reopen class discovery and file a second class certification motion was
 12 “prejudicial” to defendants because of “the financial burden of revisiting the same issues
 13 repeatedly”).

14 Here, Plaintiffs offer no “materially changed or clarified circumstances” to justify dragging
 15 the parties and the Court through the class certification process again. Instead, they seek to rehash
 16 the same issues that they had ample opportunity to address before, in the two years of active litigation
 17 that preceded the completion of class certification briefing on November 21, 2011. This included a
 18 massive discovery process involving depositions of 17 fact witnesses, 4 expert reports, and 5
 19 additional expert depositions, and production of tens of thousands of documents and voluminous
 20 data, including logs reflecting the very data that Plaintiffs now claim to need. Significantly, this
 21 discovery was conducted under an agreement in which Plaintiffs identified the specific discovery
 22 they claimed they needed for class certification, and the parties agreed to postpone Plaintiffs’ filing
 23 date to complete the specified discovery and give Plaintiffs additional time to prepare their class
 24 certification motion. (See Dkt 209 (stipulation entered by the Court); Dkt 223 (describing parties’
 25 discovery agreement).) Indeed, Plaintiffs’ counsel acknowledged at the hearing that “this case was
 26 fairly heavily discovered, frankly, for a class certification, in my experience.” (Tr. at 8:11-12.)
 27 Under these circumstances, Facebook would be unfairly prejudiced if Plaintiffs were allowed to
 28

1 impose another round of additional cost and burden on Facebook by forcing it to re-litigate class
2 certification a second time.

3 **Second**, Plaintiffs' proposal to provide a supplemental expert report does not justify a
4 renewed class certification process. The district court's analysis in *In re Fed. Home Loan Mortg.*
5 *Corp.*, 2012 U.S. Dist. LEXIS 138638, is illustrative. The court denied class certification in that
6 case, finding that the plaintiff had failed to prove the existence of an efficient market for the
7 securities at issue because plaintiff's expert on market efficiency "was unreliable and unpersuasive."
8 *Id.* at *1-2. Plaintiff then sought leave to file a renewed class certification motion and submitted a
9 declaration from a new proposed expert in support of the request. *Id.* at *2. The court denied
10 plaintiff's request, explaining that "the circumstances here do not warrant re-argument or additional
11 expert testimony about the efficiency of the market...." *Id.* at *3. The court further explained:

12 Since that hearing, the facts pertinent to the efficiency have not materially changed,
13 and plaintiff has not made a showing of changed circumstances. Without evidence of
14 changed circumstances, plaintiff effectively seeks a new opportunity to engage in a
15 battle of the experts. Plaintiff was free to choose his most persuasive expert in
support of certification. A plaintiff who wants to lead a class action should be
prepared to put his best foot forward on the initial application.

16 *Id.*; see also *Hartman*, 291 F.R.D. at 597 (plaintiffs' desire to adduce new expert testimony did not
17 constitute a "change in circumstances" warranting a renewed motion for class certification).

18 The same result applies here. As noted above, Plaintiffs propose to (1) seek additional
19 samples of Facebook's click data, and (2) submit new expert reports that would purportedly use this
20 data to demonstrate a proposed classwide method for identifying alleged invalid clicks. But
21 Facebook has *already* produced² all of the available click data for Plaintiffs' own advertisements and
22 did so well *before* Plaintiffs' class certification motion, as Plaintiffs and their data expert both
23 acknowledged. See FBCPC000065, FBCPC0000202; Shub Decl. In Support Of Plaintiffs' Motion
24 for Class Certification ¶¶ 37-38 (certifying these documents as "true and correct copies"); Ex. 4 to
25 Plaintiffs' Motion for Class Certification at 13 (Expert Report of Dr. Marcus Jakobsson). This

26 _____
27 ² Plaintiffs' account information and data were produced on September 29, 2010 and November 15,
28 2010. Facebook also produced unhashed versions of the click data on August 29, 2011.

1 production shows the specific type of click data that Facebook maintains for advertisements and how
2 that data is organized in Facebook's systems. Plaintiffs also deposed a Facebook employee at length
3 about this click data, and cited that information in their class certification motion. (Deposition of
4 Thomas Carriero, November 18, 2010, at 189:22-191:4; 289:5-314:10; Deposition of Thomas
5 Carriero, June 23, 2011 at 180:9-188:7; Plaintiffs' Motion for Class Certification at 16.)

6 Plaintiffs and their three experts could have used that data to show how they proposed to
7 identify alleged invalid clicks—but they chose not to, as this Court and the Ninth Circuit recognized.
8 *In re Facebook, Inc., PPC Adver. Litig.*, 282 F.R.D. at 458-59; *Fox Test Prep*, No. 4:09 CV-3043
9 PJH, slip op. at 3-4. Plaintiffs are not entitled to “a new opportunity to engage in a battle of the
10 experts” simply because they now wish to belatedly fix the defects in their prior expert reports.

11 Moreover, allowing Plaintiffs to submit new expert reports based on additional click data
12 *from Facebook* would do nothing to address the other problems that prevented class certification. For
13 example, Facebook's expert showed that server data *from each advertiser* is also needed to determine
14 whether any given click is allegedly fraudulent, invalid, or valid. Unlike Plaintiffs' experts,
15 Facebook's expert reviewed the available click data and prepared a detailed report showing that (1)
16 individual analysis of each click, using both Facebook click data *and* advertiser server data, was
17 needed to evaluate Plaintiffs' claims and, (2) Facebook correctly billed Plaintiff Fox Test Prep for
18 clicks based on that analysis (Fox Test Prep was the only Plaintiff that had produced its server data
19 and thus the only Plaintiff for whom this analysis could be performed). *See* Ex. L to Brown Decl. in
20 Support of Defendant's Opposition to Plaintiffs' Motion for Class Certification (Stroz Friedberg
21 Expert Report) at pp. 16-20.

22 Plaintiffs' proposal also ignores this Court's and the Ninth Circuit's additional finding that
23 Plaintiffs' expert could not identify any sources that “provide[] specific parameters for determining
24 what constitutes a valid click.” *See Fox Test Prep*, No. 4:09 CV-3043 PJH, slip op. at 4; *In re*
25 *Facebook, Inc., PPC Adver. Litig.*, 282 F.R.D. at 458-59. Indeed, Plaintiffs' experts acknowledged
26 that none exist. (*See* Defendant's Opposition to Plaintiffs' Motion for Class Certification at pp. 25-
27 26.) No amount of discovery from Facebook would remedy this defect. *See Hartman*, 291 F.R.D. at

597 (denying request to file a renewed class certification motion because “the court fails to see how its concerns [raised on the first motion for class certification] would be alleviated”).

Third, Plaintiffs’ proposal to amend or narrow its proposed class definition in an undefined way is not a “changed circumstance” that warrants a renewed class certification process. Courts routinely reject renewed class certification motions that are based on an amended class definition because “[t]he fact that Plaintiff’s counsel’s tactical decisions did not work out as planned . . . does not constitute changed circumstances.” *Washington*, 158 F.R.D. at 692. *See also In re Fed. Home Loan Mortg. Corp.*, 2012 U.S. Dist. LEXIS 138638, at *3-4 (holding that a “proposed new class definition is not an adequate basis for re-opening a question that has been exhaustively litigated.”); *Hartman*, 291 F.R.D. at 597 (revised class definition not a “changed circumstance” warranting renewal of class certification); *Mogel*, 677 F. Supp. 2d at 366 (denying request to file renewed class certification motion because “the Court declines to allow plaintiffs to revisit their prior (unsuccessful) tactical decision or delay the case any further”).

Here, Plaintiffs could have sought certification of a narrowed class in their motion, but made a strategic decision not to. Plaintiffs’ desire to re-think their legal strategy at this late stage is not an appropriate basis to revisit this Court’s class certification determination. Moreover, it is not clear how any proposed narrowing of the class could solve the fundamental obstacles that preclude certification, as identified in this Court’s order, including Plaintiffs’ failure to (1) establish the existence of a uniform contract (even among self-service advertisers), and (2) present a workable methodology for distinguishing among invalid, fraudulent and valid clicks on a classwide basis. *In re Facebook, Inc., PPC Adver. Litig.*, 282 F.R.D. 446, 456 (N.D. Cal. 2012).

Last, Plaintiffs are not entitled to reopen class discovery to seek additional click data because there is no justification for their failure to seek this discovery previously.

In *Hartman*, 291 F.R.D. 591, plaintiffs sought to reopen class discovery to obtain additional documents and witness testimony after their class certification motion was denied. *Id.* at 594. The court denied this request, explaining that plaintiffs “must show excusable neglect for failing to conduct the necessary class discovery during the time allotted by the court.” *Id.* at 595. This requires

the court to consider the factors under Fed. R. Civ. P. 6(b)(1)(B), including: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on proceedings; (3) the reason for delay; and (4) whether the moving party's conduct was in good faith. *Id.* Weighing these factors, the court concluded that: (1) plaintiffs were not justified in failing to collect the requested evidence in the first instance, given its "centrality" in their original motion; (2) the belated timing of plaintiffs' request would needlessly delay proceedings; and (3) the "added expense caused by Plaintiffs' repeated attempts to revisit the same class-related issues" would prejudice the defendant. *Id.* at 596. Accordingly, the court denied the request to reopen class discovery and further denied leave to file a renewed class certification motion.

As in *Hartman*, the additional class discovery that Plaintiffs seek relates to highly contested issues "central" to Plaintiffs' class certification motion—the ability to use available data to identify invalid clicks on a classwide basis. *Hartman*, 291 F.R.D at 595. Moreover, in the parties' prior discovery agreement, Plaintiffs identified the discovery needed for their motion, and Facebook produced this material prior to Plaintiffs' motion. Plaintiffs could have requested additional click data in this process but opted not to. In fact, Plaintiffs' experts made no effort to conduct basic analyses of the click data that Facebook had produced. (*See* Deposition of Markus Jakobsson, Ph.D., Sept. 21, 2011, 99:12-104:9; 147:06-153:16; Defendant's Opposition to Plaintiffs' Motion for Class Certification at pp. 23.) They cannot reopen discovery now to rectify "a tactical decision . . . based on twenty-twenty hindsight." *Id.*

As in *Hartman*, Plaintiffs' demand for additional class discovery would substantially prejudice Facebook, particularly in light of the tremendous amount of class discovery that Facebook has already provided. For these reasons, no further class discovery should be permitted.

B. FACEBOOK'S PROPOSAL & PLAINTIFF'S RESPONSE

Facebook's Proposal:

Facebook proposes that the parties resolve the remaining individual claims in this case by focusing first on whether Plaintiffs have sufficient evidence to show that they suffered damages from

1 alleged “invalid clicks.” Absent such evidence, Facebook intends to move for summary judgment on
2 the ground that Plaintiffs cannot establish an essential element of their claims.

3 As background, Facebook first served discovery on Plaintiffs’ alleged damages on September
4 16, 2010. This discovery included interrogatories asking Plaintiffs (1) to “[d]escribe the nature and
5 amount” of their alleged damages (Interrogatory No. 10), (2) to identify the specific clicks on their
6 ads for which they contend they were “improperly charged” (Interrogatory No. 11), and (3) to explain
7 their contention as to why those clicks are allegedly “fraudulent improper, invalid, or otherwise
8 should not have been charged” (Interrogatory No. 12). Plaintiffs objected to these discovery requests
9 on November 15, 2010, refusing to provide substantive responses on various grounds. Among other
10 objections, Plaintiffs claimed the interrogatories were “premature[]” and they did not yet have
11 sufficient information from Facebook to answer. On September 29, 2010 and November 15, 2010,
12 Facebook produced information on Plaintiffs’ advertising accounts with Facebook, including all of
13 the available data on all of the clicks generated on Plaintiffs’ advertisements. Following meet and
14 confer discussions among the parties, Plaintiffs supplemented their responses on May 6, 2011. These
15 responses still failed to identify any specific clicks on Plaintiffs’ advertisements that they claim to be
16 invalid. Instead, Plaintiffs (1) continued to assert that the interrogatories were “premature,” (2)
17 claimed they did not need to perform a “click by click analysis” to prove their damages, (3) reiterated
18 their position Facebook’s overall “click detection system” does not conform with industry standards,
19 and (4) identified certain categories of alleged nonconformity (for example “Lack of Compliance with
20 IAB Click Measurement Protocol”) but without offering evidence that these issues actually resulted
21 in any alleged invalid clicks being billed for their own advertisements.

22 Given Plaintiffs’ longstanding failure (now spanning well over four years) to provide any
23 evidence that they were charged for alleged invalid clicks, Facebook proposes that Plaintiffs have an
24 additional 30 days to provide their final supplemental responses to Facebook’s pending
25 interrogatories. Depending on Plaintiffs’ responses, Facebook will evaluate whether to file a motion
26 for summary judgment on the damages issues. If Plaintiffs stand on their current responses or
27 otherwise fail to provide sufficient evidence to show they have suffered damages from alleged invalid
28

1 clicks, Facebook believes summary judgment should be granted to dismiss Plaintiffs' individual
2 claims as a matter of law.

3 Facebook further proposes that any further discovery directed at Facebook be stayed pending
4 the resolution of this process. As indicated above, Facebook has already provided a massive amount
5 of discovery to date as a result of the wide-ranging nature of Plaintiffs' requests since this lawsuit
6 was commenced in July 2009, which has imposed a substantial and disproportionate burden on
7 Facebook in this case.

8 **Plaintiffs' Response:**

9 Facebook's proposal puts the cart before the horse. It argues that Plaintiffs have failed to
10 tender evidence of damages but ignores the fact that the parties have been focusing their efforts on
11 the class certification stage where proving the ultimate merits issues, such as liability and damages,
12 are premature. Moreover, Facebook neglects to inform the Court that the parties voluntarily agreed to
13 a stay of discovery during class certification, and thereafter the case has been on appeal for over two
14 years. In any event, Plaintiffs did put forth such evidence in their class certification papers.

15 Plaintiffs' damage claims arise from the breach of the contract to charge for only valid or
16 legitimate clicks. Because that term is undefined in the contract, the parties will need to conduct
17 additional discovery in the post class certification stage to aid the Court in evaluating the proper
18 standard for interpreting the meaning of a valid click. Plaintiffs propose a 90 day period for such
19 discovery prior to the filing of any summary judgment motion.

1 DATED: March 19, 2015

Respectfully submitted,

2 **SEEGER WEISS LLP**

3
4 By: /s/ Jonathan Shub
JONATHAN SHUB

5 **FINKELSTEIN THOMPSON LLP**

6
7 By: /s/ Rosemary M. Rivas
8 ROSEMARY M. RIVAS

9 *Attorneys for Plaintiffs*

10 DATED: March 19, 2015

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11 MICHAEL G. RHODES (116127)
12 WHITTY SOMVICHIAN (194463)

13
14 By: /s/ Whitty Somvichian
15 WHITTY SOMVICHIAN

16 Counsel for Defendant, FACEBOOK, INC.

17
18 **FILER'S ATTESTATION:**

19 Pursuant to Civil Local Rule 5-1(i)(3) regarding signatures, I attest under penalty of perjury
20 that the concurrence in the filing of this document has been obtained from its signatory.

21
22 Dated: March 19, 2015

By: /s/ Whitty Somvichian
Whitty Somvichian